Supreme Court of the United States.

CLIMACO CALDERON,
Libellant, Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY,
LIMITED,
Respondent, Appellee.

BRIEF FOR THE APPELLANT.

This cause comes up on *certiorari* to the United States Circuit Court of Appeals for the Second Circuit.

Statement of the Case.

In July, 1893, the appellant delivered to the respondent twenty-six bales and three crates of duck uniforms of the value of fifty-four hundred and thirteen $\frac{18}{100}$ dollars, for transportation by the steamship "Ailsa" from New York to Savanilla and from thence by rail to Barranquilla in the United States of Colombia, there to be delivered to the Collector of Customs.

These goods were delivered to the respondent by a truckman to whom the respondent gave a receipt (Ex. 3, p. 30) containing the words: "At the shipper's risk from fire, *and subject to the conditions* expressed in the company's form of bill of lading," &c. This receipt was afterwards surrendered to the appellee and a bill

of lading for the goods was issued to the appellant (pp. 24, 26).

This bill of lading (p. 26) commencing in the usual form with an acknowledgment of the receipt of the goods in apparent good order and condition, contains the following:

> "And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder."

Upon the back of this bill of lading was printed a long endorsement which, after specifying certain things the ship might lawfully do, and certain cases in which the carrier should escape liability, proceeds (p. 28):

> "1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of $100 per package unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made" (p. 23).
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> "9. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the Company's expense, the steamer not to be held liable for any claim for delay or otherwise" (p. 29).
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> 14. This agreement is made with reference to and subject to the provisions of the U. S. carrier's act, approved February 13th, 1893.

The goods in question were delivered on board the "Ailsa" shortly before the ship sailed, were the last goods put on board the ship, and were stowed in No. 3 hatch with cargo consigned to Carthagena (p. 25). At Savanilla the goods were not discharged; no apparent effort was made to find them; the fact that they had not been discharged as they should have been was not discovered until the ship arrived at Carthagena (pp. 9, 12); and then they were brought back to New York and reshipped on the "Alvo" (pp. 10, 14), which was lost at sea with all on board (p. 15).

No notice of the non-delivery, return, or reshipment of the goods was given the libellant (Libel, par. Third p. 1; Admitted Answer, par. First, p. 7).

Thereupon the libel in this cause was exhibited in the District Court for the Southern District of New York, to recover the value of the lost goods.

The District Court held that, inasmuch as the failure to deliver the goods at Savanilla, upon the evidence, resulted either from negligence in their stowage with reference to the covenient finding and delivery of them at the port of call, or in the search made for them at the time, it could not be excused under the ninth paragraph of the conditions endorsed on the bill of lading because of the provision in the Harter Act that it:

> "Shall not be lawful to insert in any bill of lading any agreement whereby the owner shall be relieved from liability for loss or damage arising from negligence, fault or failure in the proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge; and any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null, void and of no effect" (p. 33),

and held the respondent liable, but held also that its liability was limited to one hundred dollars for each

package of goods shipped under paragraph 1 of the conditions printed on the back of the bill of lading (p. 35), and a decree was entered accordingly.

From this decree the libellant appealed to the United States Circuit Court of Appeals for the Second Circuit. The assignment of errors is found at page 36 of the Record. The respondent did not appeal. The Circuit Court of Appeals by Mr. Justice LACOMBE (Mr. Justice WALLACE dissenting) rendered a decision affirming the decree of the District Court, and thereupon the libellant sued out a writ of *certiorari* from this Court.

Specification of Errors.

The Courts below erred in holding:

FIRST. That the libellant was bound by "the stipulations, exceptions and conditions" printed upon the back of the bill of lading.

SECOND. That, of said stipulations, exceptions and conditions, the clause numbered 1, and in part in the words and figures following, to wit: "The carrier shall not be liable for gold, silver, bullion * * * or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made" was a reasonable condition, binding upon the libellant, and to be construed as a limitation of the respondent's liability to the sum of one hundred dollars for each package of the libellant's goods.

THIRD. That the libellant was limited in his recovery to the sum of one hundred dollars for each package of his merchandise lost.

FOURTH. In affirming the decree of the District Court.

Brief of the Argument.

First. It must be kept in mind that the decree of the District Court, from which the respondent did not appeal, establishes negligence on the part of the respondent as the cause of the loss, with a resulting liability to the libellant. These questions are not open. The subject for consideration now is whether that liability is co-extensive with the libellant's loss, or is limited to a fractional part of it.

Second. The libellant was in no way bound by any matter printed upon the back of the bill of lading purporting to limit in any respect the common law liability of the respondent as a common carrier in respect of goods intrusted to it for carriage.

(a) As to such matter it is necessary to consider at the outset that there is neither proof, allegation nor reasonable ground for inference that it was ever brought to the knowledge of the libellant, and there is no suggestion of his assent to it, express or otherwise. The only evidence in this regard is, that, within three or four years, the libellant had made perhaps ten shipments of goods by the respondent's line, and that on each occasion he had received a similar bill of lading (p. 14).

(b) While it is settled law that a common carrier may by express contract limit his common-law liability for goods entrusted to him, it is also settled law, as was said in Ayres vs. Western R. Corporation, 14 Blatch., 9, that no act on the part of the shipper, short of an explicit agreement, will imply an assent on his part to a contract proposed by a carrier modifying the liability of the latter. A rule which, as is said in the same case, is capable of certain and easy application, and

if adhered to will go far to abrogate a class of contracts to which practically the carrier is the only party.

The case is, therefore, precisely within:

Railroad Co. vs. Manufacturing Co., 16 Wall., 318.

It is true that in the case at bar the reference in the bill of lading to the matters printed on its back is in the following words:

> "And finally, in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder,"

and that in the case cited there was given a receipt for the articles shipped containing the following:

> "Subject to the rules and regulations established by the company (of), a part of which notice is given on the back hereof."

The ground of the decision in the case last cited was that, conceding the right of the carrier to discharge himself of his common-law liability by special contract, assented to by the shipper, it did not follow that he could do so by any act of his own; that acceptance of such a receipt as was given did not imply assent to its terms; that the burden of proof was on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties (or obligations) which the law has annexed to his employment.

It is not perceived that the case at bar differs in principle from the case last cited. In both the receipts

given were the acts of the carrier alone. In neither case was there any "express stipulation by the shipper, either by parol or in writing." Assent by a shipper to an "agreement" printed on the back of a bill of lading, though referred to on its face, is no more logically to be implied from his acceptance of the bill than is his assent to a "condition" printed on the back of a receipt and referred to on its face, to be implied from his acceptance of the receipt.

(c) The learned Judge who formulated the decision of the Circuit Court of Appeals, construing the first clause of the matter printed on the back of the bill of lading as a limitation of the liability of the respondent to $100 for each package of goods unless the value was stated in the bill of lading and a special agreement made, says (p. 38) that the validity of stipulations of this character has been repeatedly upheld, and cites

> Railroad Co. vs. Fraloff, 100 U. S., 24, 27;
> Potter vs. Majestic, 60 Fed. R., 624;

both cases of passengers' baggage, in the first of which no question of limitation of liability by stipulation or notice was involved, but this Court said:

> "It is undoubtedly competent for carriers of "passengers, by specific regulations, *distinctly* "*brought to the knowledge* of the passenger, "which are reasonable in their character and "not inconsistent with any statute or their "duties to the public, to protect themselves "against liability, as insurers, for baggage "exceeding a fixed amount in value, except "upon additional compensation, proportioned "to the risk."

And in the second this Court said:

> "The common-law liability of common car-"riers for the safety of baggage of travelers

> " is not exactly defined, but it is not unlim-
> " ited. * * * The rule which the common
> " law laid down upon this subject is well under-
> " stood. The contract to carry the person only
> " implied an undertaking to transport such a
> " limited quantity of articles as are ordinarily
> " taken by travelers for their personal use and
> " convenience. * * * And, therefore, as this
> " obligation on the part of the carrier is not un-
> " limited, but is at common law not exactly de-
> " fined, the carrier has a right ' by reasonable
> " ' regulations of which the passenger has
> " ' knowledge ' to define and make certain to
> " both parties the extent of an implied under-
> " taking to carry baggage, * * * and of an
> " express undertaking where the contract in-
> " cludes baggage by name ; for an express con-
> " tract which simply mentions baggage would
> " not be construed to mean baggage unlimited
> " in quantity or value."

Neither case being authority for the proposition to which they were cited, but clearly showing the marked difference between the rules applicable to such cases and to the carriage of goods.

The learned Judge, in support of his position, cited also

Hart vs. Penn. R. R. Co., 112 U. S., 331,

in which this Court held that an express contract in writing signed by the shipper, by which the value of merchandise shipped was fixed at a sum certain, was valid and operative in case of loss to prevent a larger recovery.

It is submitted that these cases are in no sense authority to overrule Railroad Co. vs. Manufacturing Co., *supra.*, or in conflict with that case.

Third. If it be assumed that the libellant was bound by the stipulations and conditions printed on the back of the bill of lading, still no one of them, nor all together, were effective to limit the liability of the respondent in the cause at bar, because, here the loss was the result of the respondent's negligence.

> "It is the law of this Court that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants."
>
> Hart vs. Penn. R. R. Co., 112 U. S., 331–338.

Congress, in its wisdom, enacted a statute declaratory of the law as settled by this Court, when it passed the Act of February 13, 1893, being Chapter 105 of the Acts of the Second Session of the Fifty-second Congress, Sections 1 and 2 of which read as follows:

> "That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement, whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.
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> "SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agents or manager, to insert in any bill of lad-

ing or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

It follows, therefore, that whatever the actual intent of the respondent may have been in drafting these stipulations and conditions, they must be construed as inapplicable to any case of loss or damage resulting from the negligence of the carrier or its servants, or, if such a construction cannot be given, must be held to be void.

It cannot be said that while a carrier may not stipulate for entire exemption from liability for the consequences of his own negligence, he may, by stipulation, limit such liability to a sum less than the actual damage for which he would be otherwise liable.

To so hold would be to allow that to be done by indirection which the law prohibits. If a carrier may stipulate for a partial though not for entire exemption, what is to be the measure of the liability from which he cannot free himself?

Louisville R. R. Co. vs. Wynn, 88 Tenn., 320.

Fourth. Both Courts below erred in their interpretation of the clause which they held operative to limit the libellant's recovery.

The clause in question reads as follows:

"1. It is also mutually agreed that the "carrier *shall not be liable* for gold, silver, bul-

" lion, specie, documents, jewelry, pictures,
" embroideries, works of art, silks, furs, china,
" porcelain, watches, clocks, or for goods of any
" description which are above the value of
" $100 per package, unless bills of lading are
" signed therefor, with the value therein ex-
" pressed, and a special agreement is made."

Exceptions or clauses introduced in favor of one party to the contract, of which he himself is the author, are to be construed most strongly against him. What is ambiguous, what is doubtful, must be construed against the shipowner in whose favor it has been inserted.

There is nothing to require a construction more favorable to the shipowner than the plain meaning of the words imports.

Leggett, Bills of Lading, p. 11.
Burton vs. English, 12 Q. B. D., 218, 224.
The Main, 152 U. S., 122-132.

Furthermore, in the interpretation of written instruments regard must be paid to the context and collocation of phrases, which in case of doubt or ambiguity is controlling. The intent of the parties must be sought in the paper itself and deduced from the expressions used. It is not permitted to speculate in this particular.

The clause under consideration was plainly intended, not to limit, but to exclude, liability on the part of the carrier in a large number of specified cases. If operative, it would be impossible to spell out from it any liability whatever on the part of the respondent for the loss of gold, silver, &c., unless the condition had been complied with.

If, by this clause, the respondents intended, as they plainly did, to relieve themselves under certain circumstances from any liability whatever for the loss of porcelain, watches or clocks, how can any intention on their part be inferred to remain liable to the extent of

$100 per package for the very next instance of exemption specified. There is no change of phraseology.

The exemption, absolute in the one case, designated by the nature of the goods, is equally absolute in the other, defined by the value of the goods enclosed in a single package.

To the average mind it would seem that the respondent had carefully chosen words to effectuate absolute exemption from all liability.

Had the phrase read " for goods of any description, above the value of $100 per package," or " for goods of any description, in excess of $100 per package," the intention to retain a restricted and limited liability for all other goods than those previously specified would have been plain. This form of expression is also the one most frequently used, and a departure from it is significant. When the respondent inserted the words " which are," it must be presumed to have done so advisedly, to have intended the result which the grammatical construction of the phrase so altered produced.

The sentence

> " It is mutually agreed that the carrier shall
> " not be liable for goods of any description
> " which are above the value of $100 per package,
> " unless," &c.,

is certainly not paraphrased by the sentence,

> " It is mutually agreed that the carrier shall
> " be liable for all goods, but only to the extent
> " of $100 per package, unless," &c.

The exemption in terms is from all liability for any goods which are put up in a package, if the contents of the package are worth more than one hundred dollars. This is the plain meaning of the contract (if it is a contract) as made. To say that the parties intended only an exemption for any excess in value over $100 per

package is to make a new contract for them, to which one party, at least, never assented by word or deed.

The clause in question is a creation of the respondent. In its framing the libelant had no part or voice. If it affects the libelant at all, it is because of his receipt of the bill of lading with this clause printed on its back. It contains matter in derogation of the common-law rights of the libelant. He may, therefore, properly insist that it shall be literally and strictly construed as against the respondents, and stand or fall according to its legality or illegality upon such construction.

Upon its face this clause purports to exonerate the respondent from all liability for the loss of goods under certain circumstances, even though, as in this case, resulting from its own fault or negligence.

It is, therefore, void under

Railroad Co. vs. Lockwood, 17 Wall., 357.
Act of Feby. 13, 1893.

Fifth. One further consideration presents itself. The contract between the parties was for the transportation of the libellant's goods by sea from New York to Savanilla. Whatever provisions it contained referred solely to matters within the contracted voyage. Granting that the limitation of liability is as the Court below has said, that limitation referred only to occurrences during the transportation contemplated. When the vessel left Savanilla with the goods on board the contractual relation between the parties ceased The respondent became, from that moment, bailee in its own wrong of the libellant's goods. It was, therefore, the absolute guarantor of their safety to the full extent of their value.

Ellis vs. Turner, 8 Term. Rept., 531.
Story on Bailments, § 509.

Sixth. The decree of the District Court should be reversed and the cause remanded to that Court with instructions to allow the libellant the full value of the goods lost, as his damages in respect of the matters in the libel herein set forth.

J. LANGDON WARD,
Of Counsel for Appellant.